

Regulatory Bulletin

Handbook: Thrift Activities
Subject: Enforcement Actions

Section: 150
RB 18-3a

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Enforcement Policy Statement on Civil Money Penalties

Summary: This Regulatory Bulletin describes the Office of Thrift Supervision's (OTS) powers and policies for the assessment of civil money penalties, as well as the factors to be taken into consideration by OTS in deciding whether a civil money penalty should be imposed, and if so, in what amount. The Bulletin provides instructions for use of the civil money penalty assessment form. This Bulletin supersedes Regulatory Bulletin 18-3, dated June 13, 1990.

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Introduction

Among the enforcement tools available to OTS is the assessment of civil money penalties ("CMPs").

As with its other enforcement powers, OTS assesses CMPs so as to ensure the safety and soundness of savings associations and the industry's compliance with applicable laws, rules, and regulations. A CMP is particularly appropriate to remove the incentive for financial gain from misconduct, and to deter further misconduct involving the particular savings association and similar abuses elsewhere in the industry.

The policies and procedures discussed in this policy statement are guidelines for the use of OTS, its staff and agents; they do not create substantive or procedural rights enforceable at law or in any administrative proceeding. OTS uses the CMP Form as guidance in considering and assessing CMPs. The Form consists of a CMP Tier Matrix that is used to determine the tier of a viola-

tion, and a CMP Calculation Sheet that is used to assess a penalty amount for the violation. Two tier matrices have been prepared: a General Tier Matrix and a Reporting Violation Tier Matrix. A Tier Matrix (if applicable to the violation) and Calculation Sheet should be completed according to the instructions before any penalty is assessed. As explained below, in some cases a determination not to assess a CMP can be made without completing the Tier Matrix; in others, the determination will be made after completing the Tier Matrix.

This Policy Statement briefly describes the statutory framework for civil money penalties, the considerations that should inform the decision whether to assess a CMP for a violation, and the procedure for making that decision. Instructions for determining the amount of an assessment are also provided.

Statutory Scheme

General Civil Money Penalty Statute

The general civil money penalty statute establishes three tiers of ascending penalties. 12 U.S.C. 1818 (i)(2). The General Tier Matrix applies to civil money penalties assessed under this statute.

The first CMP tier reaches an institution or institution-affiliated-party who violates any law or regulation,

any final order or temporary order, any written condition, or any written agreement between the institution and the agency.

The second CMP tier reaches an institution or institution-affiliated-party who: (i) violates a law or regulation or order or written condition or agreement; (ii) recklessly engages in an unsafe or unsound practice in conducting the affairs of the institution; or (iii) breaches any fiduciary duty, which violation, practice, or breach (a) is part of a pattern of misconduct; (b) causes or is likely to cause more than a minimal loss to the institution; or (c) results in pecuniary gain or other benefit to the party.

The third CMP tier reaches an institution or institution-affiliated-party who knowingly commits the violation, practice, or breach described in (i), (ii), or (iii) above, and by reason of such violation, practice, or breach knowingly or recklessly causes a substantial loss to the institution or a substantial pecuniary gain or other benefit to that party.

In addition to defining the three tiered structure, the general civil money penalty statute also provides in subparagraphs (E) - (I) for the manner in which civil money penalties shall be assessed and collected by OTS.

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Other Civil Money Penalty Statutes

Control Act

The FDIA authorizes OTS to assess civil money penalties against persons who violate any provision of the Control Act or any regulation or order issued thereunder. 12 U.S.C. 1817(j)(16). Such penalties are assessed according to the three-tier structure and other provisions in the general civil money penalty statute.

Non-Certified Appraisers

OTS is authorized to assess civil money penalties against associations that seek, obtain, or give money or any other thing of value in exchange for the performance of an appraisal by a person the association knows is not a State-certified or State-licensed appraiser (as defined in 12 U.S.C. 3345) in connection with a federally-related transaction (as defined in 12 U.S.C. 3350). The type of federally-related transaction and the type of appraiser required are described in 12 U.S.C. 3342, 3343.

Such penalties are assessed according to the three tier structure and other provisions in the general civil money penalty statute.

Home Mortgage Disclosure Act

OTS is authorized to assess civil money penalties for violations of the Home Mortgage Disclosure Act. 12 U.S.C. 2804. Such penalties are to be assessed according to the three-tier structure and other provisions of the general civil money penalty statute.

Reports of Condition/Holding Company Reports/Certified Statement of Assessment Base

Under the HOLA, OTS is authorized to assess civil money penalties against associations, holding companies or their subsidiaries that either fail to submit or to publish any

report within the time frame required by OTS or that submit or publish any false or misleading information. 12 U.S.C. 1464(v); 12 U.S.C. 1467a(r). A similar penalty structure governs the failure to make a timely or accurate submission of a certified statement of assessment base. 12 U.S.C. 1817(c) (5).

These provisions contain a separate three-tiered structure that OTS must apply when making an assessment under those sections. The Reporting Tier Matrix applies to civil money penalties assessed under these statutes.

The first tier addresses instances where, despite procedures reasonably adapted to avoid inadvertent and unintentional error, and as a result of such error, the savings association fails to submit or publish a required report, information, or certified statement within the specified time; submits or publishes any false or misleading report, information, or certified statement; or inadvertently transmits or publishes any report or certified statement that is minimally late. The savings association is subject to a penalty of up to \$2,000 for each day the failure continues or the false or misleading information is not corrected.

The second tier addresses instances not falling within the first tier where a savings association fails to submit or publish a required report, information, or certified statement within the specified time, or submits or publishes any false or misleading report, information or certified statement. The savings association is subject to a penalty of up to \$20,000 for each day the failure continues or such false or misleading information is not corrected.

Under the third tier, civil money penalties may be assessed if the savings association knowingly or with

reckless disregard for accuracy submits or publishes a false or misleading report, information or certified statement. The savings association is subject to a penalty of up to \$1,000,000 or 1 per cent of total assets, whichever is less, for each day the failure continues or such false or misleading information is not corrected.

A penalty imposed under these provisions is to be assessed and collected by the agency in the manner provided in subparagraphs (E), (F), (G), and (I) of the general civil money penalty statute.

Affiliate Refusal to Cooperate

Under the HOLA, OTS is authorized to assess civil money penalties against an association if any affiliate of the association refuses to permit any examiner of OTS to conduct an examination, or refuses to provide any information required to be disclosed in the course of any examination. 12 U.S.C. 1467(d). The agency may assess a penalty of up to \$5,000 for each day that such refusal continues. This penalty is to be assessed and collected in the manner provided in the general civil money penalty statute.

Holding Company Act

The HOLA also authorizes OTS to assess civil money penalties against any company that violates, or any person who participates in a violation, of any provision of the Holding Company Act or any regulation or order issued pursuant thereto. 12 U.S.C. 1467a(i)(3). The agency may assess a penalty of up to \$25,000 for each day the violation continues. This penalty is to be assessed and collected in the manner provided in subparagraphs (E), (F), (G), and (I) of the general civil money penalty statute.

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Consideration and Assessment of CMPs

The tier of a violation should be a central factor in determining whether a violation should be assessed a CMP, and it should be evaluated in the context of the enforcement and supervisory objectives in an individual case. If in a particular instance a CMP is not assessed when it otherwise is available, that should be because the enforcement and supervisory objectives that would be served by assessment of a CMP are effectively addressed through other means.

Only rarely if ever should conduct that falls within Tier 3 not be assessed a CMP. By contrast, many Tier 1 violations, and some Tier 2 violations, will appropriately not be assessed a CMP where the regulatory objectives are better addressed through other means and there are no “plus factors.” Examples of such plus factors are: financial gain to the respondent from the violation; an intent to commit the violation; a substantial loss to the institution; violation despite notice to management; evidence of concealment of the violation; a history of similar violations; or substantial noncompliance with the corrective measures required by agency actions such as Supervisory Agreements, cease and desist orders, and directives on supervisory issues.

CMPs and other enforcement actions would normally not be employed when addressing occasional and inadvertent regulatory violations or record keeping errors, provided the errors or violations do not pose a threat to the safety and

soundness of an institution or undermine the integrity of its books and records.

Conduct that should prompt CMP assessment would include significant regulatory violations or practices that remain substantially uncorrected after management or the board of directors of an institution has been placed on notice. In general, CMPs usually are warranted for substantial non-compliance with the corrective actions required by Supervisory Agreements, cease and desist orders, and directives on supervisory issues. Substantial non-compliance with a prompt corrective action directive also may warrant a CMP.

Prior regulatory warnings or sanctions are of course not a prerequisite for the consideration of CMPs or other enforcement actions. Unlawful conduct or unsafe and unsound practices that could affect adversely the health of the institution or the integrity of the regulatory process often are subject to redress through CMPs.

Procedure Regarding Determination Whether to Assess a Civil Money Penalty

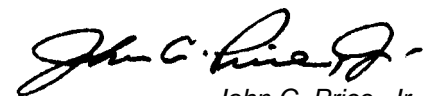
If an examiner discovers a violation of law, regulation or order, violation of a condition imposed in writing or a written agreement, a breach of fiduciary duty, or an unsafe or unsound practice, that examiner should consider recommending the assessment of a civil money penalty. The decision whether to assess should apply the analysis described

above, in the context of the overall enforcement and supervisory strategy appropriate to the associated institution.

If the examination/supervision staff recommends against pursuing enforcement action, then it is unnecessary to document separately the decision not to assess civil money penalties. If enforcement action is recommended, but does not include the assessment of civil money penalties, then the decision not to recommend assessment should be explained and documented in the following manner.

Where the assessment of a civil money penalty is clearly unwarranted for a violation, and there are no “plus factors” described above, a Tier Matrix need not be completed. Instead, the document recommending enforcement action should include a statement that explains why, applying this Policy statement and the governing overall enforcement and supervisory strategy, a civil money penalty is not recommended.

If any of the “plus factors” is present, then a Tier Matrix should be completed for the violation, and consideration of assessment should proceed according to the instructions there. While the presence of “plus factors” does not require assessment, such factors do warrant careful consideration of the tier of the violation. Unless the decision is made after completing the Tier Matrix to recommend against assessment of a civil money penalty, the 15 day letter should be sent out at that time.



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of Policy